

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>WILLIE J. MOORE</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 180,108 & 201,196
<b>THE BOEING COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>AETNA CASUALTY &amp; SURETY</b>	)	
	)	
AND	)	
	)	
<b>KEMPER NATIONAL INSURANCE CO.</b>	)	
Insurance Carriers	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant requested review of the Award dated September 19, 1997, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument in Wichita, Kansas, on February 13, 1998.

**APPEARANCES**

Lawrence M. Gurney of Wichita, Kansas, appeared for the claimant. Eric K. Kuhn of Wichita, Kansas, appeared for the respondent and its insurance carriers. Chris S. Cole of Wichita, Kansas, appeared for the Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties's stipulations are listed in the Award. In addition, at oral argument to the Appeals Board Mr. Kuhn announced Boeing and its insurance carriers were not pursuing reimbursement from the Workers Compensation Fund in either proceeding.

### ISSUES

Mr. Moore alleges he injured his low back while working for Boeing on both June 9, 1993, and January 6, 1995. The Administrative Law Judge found Mr. Moore's injuries were, at most, temporary in nature and denied his request for permanent partial disability benefits and future medical treatment.

Boeing contends Mr. Moore is not credible and, therefore, has failed to prove he has a permanent injury or impairment because of the above accidents. Mr. Moore, however, contends he has proven he permanently injured his back in the June 1993 accident and requests an award for work disability.

The only issue before the Appeals Board on this review is the nature and extent of Mr. Moore's injury and disability.

### FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Mr. Moore injured his low back on June 9, 1993, when he lifted a 50-pound jig plate. On January 6, 1995, he reinjured his low back while moving panels from a cart to a bench. The parties stipulated Mr. Moore sustained personal injury by accident on both dates. Also, the parties stipulated both accidents arose out of and in the course of his employment with Boeing.
- (2) Aetna is Boeing's insurance carrier for the June 1993 accident and Kemper is the insurance carrier for the January 1995 accident.
- (3) The parties stipulated that the average weekly wage for the first accident was \$707.27 and that the average weekly wage for the second accident was sufficient to qualify for the maximum weekly disability payment.
- (4) After the first accident, Mr. Moore obtained medical treatment from Dr. George G. Flutter, Dr. Paul D. Lesko, and Dr. Denis Knight. He missed several weeks of work. After the second accident, Mr. Moore again sought medical treatment. While off work for that accident, he was laid off.
- (5) Boeing referred Mr. Moore for medical treatment with board-certified physical medicine and rehabilitation physician George G. Flutter, M.D. The doctor saw Mr. Moore for his back on four occasions from March through July 1994. At their first visit, the doctor found clinical findings consistent with a lumbar soft tissue strain and symptom magnification. In addition to physical therapy and work hardening, the doctor had Mr. Moore undergo a functional capacities evaluation, which the doctor found valid. Based upon his 1994 evaluation, Dr. Flutter believes Mr. Moore has a 5 percent whole body functional impairment for low back strain due to the June 1993 accident. The doctor's final recommended work restrictions are no lifting more than 50 pounds on an occasional basis, 20 pounds on a frequent basis, and 10 pounds on a constant basis; limit climbing, squatting,

kneeling, bending, stooping, and twisting to an occasional basis; and limit sitting and standing to no more than one hour at a time without a break or changing positions.

(6) Board-certified orthopedic surgeon Robert A. Rawcliffe, Jr., M.D., examined Mr. Moore in December 1996 and found he had chronic lumbosacral strain and no more than a 5 percent whole body functional impairment due to the June 1993 accident. He also thought Mr. Moore should follow certain work restrictions and limitations:

I thought that he should be restricted to the medium work category under OSHA standards, which would allow occasional lifting of up to 50 pounds, more frequent lifting up to 25 pounds, and avoidance of repetitive bending, crouching, and stooping.

The doctor found no objective findings during the examination. But the doctor admits one would not expect to find ongoing objective findings from a chronic lumbosacral strain.

(7) Mr. Moore contends the June 1993 accident is solely responsible for any permanent functional impairment he may have. No evidence has been presented regarding the loss of ability to perform work in the open labor market or loss of ability to earn a comparable wage based upon either Dr. Fluter's final work restrictions or Dr. Rawcliffe's recommended medical restrictions.

(8) At the time of the October 1996 regular hearing, Mr. Moore was unemployed and had not worked anywhere since January 6, 1995, despite some attempts to find a job. When Mr. Moore testified at his July 1997 deposition, he was not looking for work because he felt no employer would hire him due to his poor health.

(9) Mr. Moore testified at the regular hearing that he had problems bending, twisting, and stooping; could not lift over 10 pounds; had trouble getting in and out of a chair and car; and had problems walking because he was dragging his legs.

(10) Based upon both Dr. Fluter's and Dr. Rawcliffe's testimony, the Appeals Board finds Mr. Moore has a 5 percent whole body functional impairment as a result of the June 9, 1993, accident. The Appeals Board, however, also finds that Mr. Moore did not sustain either permanent injury or impairment as a result of the January 1995 accident.

#### **CONCLUSIONS OF LAW**

As found above, Mr. Moore has a 5 percent whole body functional impairment as a result of the June 9, 1993, accident. Both doctors considered claimant's exaggerated complaints in determining his impairment rating for a chronic back strain.

Because his is an "unscheduled" injury, K.S.A. 1992 Supp. 44-510e provides that Mr. Moore is entitled to permanent partial general disability benefits based upon the higher of work disability or functional impairment:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence.

Here, Mr. Moore has failed to prove any loss of ability to either perform work in the open labor market or earn a comparable wage as a result of the June 1993 accident. Therefore, Mr. Moore's permanent partial general disability should be based upon the 5 percent whole body functional impairment rating.

In Docket No. 180,108, Mr. Moore is entitled to an award for the temporary total disability benefits and the medical expense that have been previously paid. Also, Mr. Moore is entitled to unauthorized medical expense up to the statutory maximum of \$350 and may apply for future medical expense in a proper application to the Director.

In Docket No. 201,196, Mr. Moore is entitled to an award for the stipulated \$140 medical expense that has been paid and unauthorized medical expense up to the statutory maximum of \$500.

### **AWARD**

#### **Docket No.180,108**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark, dated September 19, 1997, should be, and is hereby, modified.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Willie J. Moore, and against the respondent, The Boeing Company, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury which occurred June 9, 1993, and based upon an average weekly wage of \$707.27 for 12 weeks of temporary total disability compensation at the rate of \$299 per week or \$3,588.00, followed by 403 weeks of permanent partial disability benefits at the rate of \$23.58 per week or \$9,502.74, for a 5% permanent partial general disability, making a total award of \$13,090.74

As of March 19, 1998, there is due and owing claimant 12 weeks of temporary total disability compensation at the rate of \$299 per week or \$3,588.00, followed by 237.14 weeks of permanent partial disability compensation at the rate of \$23.58 per week in the sum of \$5,591.76 for a total of \$9,179.76, which is ordered paid in one lump sum less any

amounts previously paid. The remaining balance of \$3,910.98 is to be paid for 165.86 weeks at the rate of \$23.58 per week, until fully paid or further order of the Director.

In addition, Mr. Moore is awarded the medical expense that has been previously paid and unauthorized medical expense up to the statutory maximum of \$350 upon proof that it has been incurred. Mr. Moore may request future medical benefits in a proper application to the Director.

DOCKET NO. 201,196

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark, dated September 19, 1997, should be, and is hereby, modified. Mr. Moore's request for permanent partial disability benefits is denied. For the January 6, 1995, accident, Mr. Moore is awarded that medical expense that has been previously paid and unauthorized medical expense up to the statutory maximum of \$500 upon proof that it has been incurred. This award is assessed against the respondent, The Boeing Company, and its insurance carrier, Kemper National Insurance Co.

The Appeals Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS  
Eric K. Kuhn, Wichita, KS  
Chris S. Cole, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director